

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID JOHN WAGNER, JR.,

No. C 09-4662 SI (pr)

Petitioner,

**ORDER DENYING HABEAS
PETITION AND DENYING
CERTIFICATE OF APPEALABILITY**

v.

RANDY GROUNDS, Warden,

Respondent.

INTRODUCTION

David John Wagner, Jr., a prisoner of the State of California, filed this habeas action under 28 U.S.C. § 2254 to challenge his 2005 conviction in the Lake County Superior Court. This matter is now before the court for consideration of the merits of the pro se habeas petition. For the reasons discussed below, the petition is denied.

BACKGROUND

I. The Crimes

On December 13, 2004, the Lake County District Attorney filed an information charging Wagner with five counts: willful, deliberate, and premeditated attempted murder (Cal. Pen. Code §§ 187(a), 664(a);¹ count 1); aggravated mayhem (§ 205; count 2); willful infliction of corporal injury on a co-habitant resulting in a traumatic condition (§ 273.5(a); count 3); assault with a deadly weapon, i.e., a knife (§ 245(a)(1); count 4); and dissuading a witness by force or threat of force (§ 136.1(c)(1); count 5). The information alleged that counts 1, 3, 4, and 5 included the enhancing allegation that Wagner inflicted great bodily injury under circumstances involving

¹ Unless otherwise specified, further statutory references are to the California Penal Code.

1 domestic violence (§12022.7(e)); that count 1 included an enhancement for personal infliction
2 of great bodily injury (§ 12022.7(a)); and that counts 1, 2, 3, and 5 included an enhancement for
3 use of a deadly and dangerous weapon in the commission of the crime (§ 12022(b)(1)). The
4 information also alleged nine factors in aggravation (Cal. Rule of Court 4.421(a)(1, 2, 6, 7),
5 (b)(1-5)).

6 The California Court of Appeal set out the facts related to the underlying criminal
7 charges:

8 Paris Dalton began renting a room in a two-bedroom mobile home
9 occupied by defendant on September 3, 2004. The mobile home was at space
10 number 13 of a mobile home park. According to Dalton, she had known
11 defendant for about a month before she moved in, and he had been "courting" her.
12 When she moved in he was "very sweet," "trying to get with [her]." After she
13 moved in, defendant would sleep with Dalton on the mattress in her room almost
14 every night, and they had sexual relations on about three occasions. Dalton
15 characterized their relationship as "boyfriend/girlfriend," and they discussed
16 having an exclusive relationship with each other.² Defendant also had access to
17 another trailer in the park, at space number 45, and spent time there, but he would
18 return to number 13 late at night. Dalton and Wagner did not go out in public
19 together. On one occasion when defendant's grandfather came to the trailer,
20 defendant told Dalton to hide in the bedroom, because he had not told his
21 grandfather he had rented the room to her.

22 On the evening of September 12, 2004, defendant and Dalton had a
23 discussion about her belongings. Dalton was planning to take a two-week trip,
24 and she had packed up her valuables and put them by the door to be put in storage,
25 although she planned to leave her clothes and some other items in the trailer.
26 Defendant told her he wanted her to put the belongings she had packed up into an
27 unlocked storage shed so his grandfather, who owned the trailer, would not know
28 he had rented out a room. The discussion became an argument, and defendant told
Dalton he would call the police, tell them she was an intruder, and have her
removed. The incident escalated into a physical fight, and the two traded blows.
Dalton pinned him down, but let him up twice. Each time he began hitting her,
striking her face until it bled.

Dalton went to a telephone booth to call the police. She dialed 9-1-1, but
was unable to get through. As she stood there, she saw defendant coming toward
the phone booth. He asked who she had called, and she told him she had tried to
call a friend. He told her to come home to sleep, and patted her on the back, then
moved so she was in front of him. He then stabbed her in the back with a knife.
She sat on the ground and felt the blood spurting from the wound. She looked up
at defendant, and he cut her throat with the knife.

² Defendant later told a police officer that he had slept in Dalton's bed a couple of times,
that he and Dalton had engaged in sexual relations once, that she wanted to be his girlfriend, and
that he "wanted to take things slow."

1 Dalton told defendant she would bleed to death if she did not get to a
2 hospital right away and he told her to go back to the house with him. Dalton
3 repeated that she needed to go to a hospital, and defendant agreed to call an
4 ambulance if she would say that he was not responsible for her injuries. She
5 agreed, and they went to the manager's unit at the entrance to the trailer park.
6 Dalton was "in shock," and she was holding her back. The manager called 9-1-1,
7 and at some point defendant left. An ambulance arrived, and Dalton asked to be
8 taken to the hospital quickly because she was losing a lot of blood. She was afraid
9 she would bleed to death. She spoke with a police officer in the hospital and told
10 him who had injured her. At the time, she thought there was a good chance she
11 would die.

12 Dr. Wolfgang Schug, who treated Dalton at the emergency room, saw
13 evidence of a blow to her nose, an eight-centimeter cut across her throat, and a
14 fairly deep stab wound in her back. The wound in her back was at least six
15 centimeters deep and extended into the chest cavity. One of Dalton's lungs had
16 collapsed, and the wound was potentially life-threatening. The wound to her neck
17 was about half an inch from both her trachea and her jugular vein, and it could
18 have been fatal if it had reached either location. Dr. Schug sutured the neck
19 wound and admitted Dalton to the hospital to have her back wound treated.

20 Officer Raymond Brady of the Clearlake Police Department arrived at the
21 office of the mobile home park's manager a little after 2:00 on the morning of
22 September 13. He saw Dalton sitting there, bleeding from her neck area, "covered
23 in blood," and with a wound in her back. Dalton told Brady that defendant, who
24 lived at number 13, had stabbed her. She said she had been his roommate for 10
25 days, and that they did not have a relationship. She appeared to be distressed and
26 "kind of in shock." Officers looked for defendant at the trailers in spaces 13 and
27 45, but did not find defendant in either place. They searched the mobile home
28 park for defendant for about an hour, but did not find him. In an enclosed area,
they found a plastic tobacco bag containing a T-shirt that was wet and had what
appeared to be bloodstains, and a knife that appeared to have blood on it. DNA
on the knife and the shirt was later tested, and was found to be consistent with
Dalton's. An officer who examined the unit at space 13 saw what appeared to be
spots of blood in the gravel on the driveway, on the door trim, and on blinds
hanging in the doorway. There was a pile of loose tobacco on a mattress in a
bedroom, and the shower area was wet.

20 Around 7:00 in the morning, officers returned to the mobile home park and
21 found defendant at the trailer at space 45. After being advised of his rights and
22 waiving them, defendant spoke with Detective James Bell. He admitted the initial
23 physical altercation with Dalton, but denied attacking her with a knife. He
24 acknowledged having had sexual relations with Dalton once, but said that it was
25 a mistake, and that aside from that one incident he had been sleeping either on the
26 couch or in his other trailer. Dalton had wanted to be his girlfriend, but he told her
27 he wanted to "take things slow." The clothes he was wearing during the interview
28 contained stains that were later tested and found to contain Dalton's DNA.

25 Officer Brady spoke with Dalton again at the hospital, and she told him that
26 she and defendant had had sexual relations four days previously. She also
27 described herself as his tenant and said they had lived together for five days.

27 Arsen Barbeau, one of the paramedics who treated Dalton at the mobile
28 home park, testified that when he arrived, Dalton's neck was not bleeding and he

1 did not do anything to treat the injury. However, when shown a picture of Dalton
2 on the night of the incident, he agreed that there was blood on the neck wound.
He heard Dalton say that defendant had stabbed her.

3 Cal. Ct. App. Opinion, ¶. 2-4 (footnote renumbered).

4
5 II. Procedural History

6 On August 31, 2005, a Lake County jury found Wagner guilty of all counts and all
7 enhancements.

8 On July 6, 2006, the trial court sentenced Wagner to an aggregate term of six years plus
9 life in prison.

10 On March 17, 2008, the California Court of Appeal reversed the aggravated mayhem
11 conviction, but otherwise affirmed the judgment. The reversal had no effect on the sentence
12 because the trial court had stayed the sentence for the mayhem conviction. Wagner did not seek
13 review of the state appellate court's opinion in the California Supreme Court.

14 Wagner subsequently filed a petition for a writ of habeas corpus in the Lake County
15 Superior Court. On August 20, 2008, the state superior court denied the petition in a reasoned
16 opinion.

17 On September 26, 2008, Wagner filed a petition for a writ of habeas corpus in the
18 California Court of Appeal. On December 11, 2008, the state appellate court denied the petition.

19 On January 7, 2009, Wagner filed a petition for a writ of habeas corpus in the California
20 Supreme Court. On July 15, 2009, the state supreme court summarily denied the petition.

21 On September 30, 2009, Wagner filed this action. In his petition, Wagner asserted three
22 claims that the court found cognizable: (1) he received ineffective assistance of trial counsel in
23 that trial counsel failed to adequately prepare a defense expert to testify at trial (Claim 1); (2) his
24 right to due process was violated by the admission of evidence regarding his propensity to
25 commit domestic violence (Claim 2); and (3) his right to due process was violated by the
26 admission of evidence of the victim's out-of-court statements (Claim 3). The court then ordered
27 respondent to show cause why the petition should not be granted.

28 On June 3, 2010, respondent moved to dismiss the petition, arguing that state judicial

1 remedies had not been exhausted for Claims 2 and 3. Wagner conceded non-exhaustion as to
2 Claims 2 and 3, and chose to amend the petition to delete the unexhausted claims and proceed
3 with just Claim 1, as to which state judicial remedies had been exhausted. He also filed an
4 amended petition that deleted the two unexhausted claims and presented just his one exhausted
5 claim (Claim 1).

6 On December 6, 2010, the court granted respondent's motion to dismiss, dismissed the
7 unexhausted Claims 2 and 3, and noted that the action "will proceed with just the claim in the
8 amended petition, i.e., the claim for ineffective assistance of counsel." (Dec. 6, 2010 Order at
9 1.)

10 Respondent filed an answer to the amended petition.³

11 Rather than file a traverse, Wagner filed a motion for appointment of counsel.

12 On March 28, 2011, the court denied Wagner's motion for appointment of counsel, and
13 ordered him to file his traverse no later than May 6, 2011. To date, Wagner has neither filed a
14 traverse nor a request for an extension of time to do so. The case is now ready for review on the
15 merits.

16 JURISDICTION AND VENUE

17 This court has subject matter jurisdiction over this habeas action for relief under 28
18 U.S.C. § 2254. 28 U.S.C. § 1331. This action is in the proper venue because the challenged
19 action concerns a conviction obtained in Lake County, which is in this district. See 28 U.S.C.
20 §§ 84, 2241(d).

22 EXHAUSTION

23 Prisoners in state custody who wish to challenge collaterally in federal habeas
24 proceedings either the fact or length of their confinement are required first to exhaust state
25

26
27 ³ Wagner named Ken Clark, former warden of the California Substance Abuse Treatment
28 Facility and State Prison in Corcoran, California, as the respondent in this action. Randy
Grounds, the current warden of the Correctional Training Facility in Soledad, California -- where
Wagner is currently incarcerated -- has been substituted as respondent in place of Wagner's prior
custodian pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

1 judicial remedies, either on direct appeal or through collateral proceedings, by presenting the
2 highest state court available with a fair opportunity to rule on the merits of each and every claim
3 they seek to raise in federal court. See 28 U.S.C. § 2254(b), (c). As mentioned above, the
4 parties do not dispute that state court remedies were exhausted for the remaining ineffective
5 assistance of counsel claim asserted in the amended petition.

7 STANDARD OF REVIEW

8 This court may entertain a petition for writ of habeas corpus "in behalf of a person in
9 custody pursuant to the judgment of a State court only on the ground that he is in custody in
10 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The
11 petition may not be granted with respect to any claim that was adjudicated on the merits in state
12 court unless the state court's adjudication of the claim: "(1) resulted in a decision that was
13 contrary to, or involved an unreasonable application of, clearly established Federal law, as
14 determined by the Supreme Court of the United States; or (2) resulted in a decision that was
15 based on an unreasonable determination of the facts in light of the evidence presented in the
16 State court proceeding." 28 U.S.C. § 2254(d).

17 "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court
18 arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or
19 if the state court decides a case differently than [the] Court has on a set of materially
20 indistinguishable facts." Williams (Terry) v. Taylor, 529 U.S. 362, 412-13 (2000).

21 "Under the 'unreasonable application' clause, a federal habeas court may grant the writ
22 if the state court identifies the correct governing legal principle from [the] Court's decision but
23 unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. "[A] federal
24 habeas court may not issue the writ simply because that court concludes in its independent
25 judgment that the relevant state-court decision applied clearly established federal law
26 erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411. A
27 federal habeas court making the "unreasonable application" inquiry should ask whether the state
28 court's application of clearly established federal law was "objectively unreasonable." Id. at 409.

DISCUSSION

I. Ineffective Assistance Of Counsel

Wagner claims his Sixth and Fourteenth Amendment rights to effective assistance of counsel were violated when his trial counsel failed to adequately prepare a defense expert to testify at trial.

A. Background Facts

The Lake County Superior Court denied Wagner's claim as follows:

Viewing the allegations of ineffective assistance of counsel in the light most favorable to the Petitioner, the court finds that no prima facie claim for relief is stated. Recognizing that the Petitioner's mental condition would be an issue in the case, defense counsel [Stephen Tulanian] retained the services of an expert, Dr. Kastl, who interviewed the defendant, conducted tests, and later testified for the defense at trial. After the verdict, the defendant's family supplied additional information about the defendant. Mr. Tulanian appropriately sent this new information to Dr. Kastl for analysis, and based on this new information, Mr. Tulanian unsuccessfully moved for a new trial.

The above facts do not establish a prima facie showing of ineffective assistance of counsel. The actions of Mr. Tulanian are what would be expected of a competent defense counsel.

The Writ is therefore denied.

Cal. Sup. Ct. Opinion at 1-2.

Aside from a brief one-paragraph description above, there is no other state court opinion which summarizes the facts underlying Wagner's ineffective assistance of counsel claim. As explained in the reasoned opinion by the state superior court above, Wagner's trial counsel moved for a new trial -- his second motion for a new trial.⁴ The hearing on this motion was held on the same date as sentencing, July 6, 2006. In support of respondent's answer to the amended petition, a transcript of the aforementioned hearing on the second motion for a new trial, Resp't Ex. B (July 6, 2006) at 4-44, as well as the reporter's transcript of the entire trial proceedings -- including Dr. Kastl's testimony, RT 1-1672, and the clerk's transcript, CT 1-627 -- have all been

⁴ On May 18, 2006, Wagner's trial counsel filed his first motion for a new trial, which related to his belief that "a [not guilty by reason of insanity] defense might have been appropriate." CT 999. This first motion was denied by the trial court.

1 lodged for the court's review. Relying on these transcripts, respondent has summarized the
2 background facts relating to the ineffective assistance of claim in his memorandum of points and
3 authorities in support of the answer. Because Wagner did not file a traverse, there is nothing in
4 the record that indicates that he disputes the underlying course of events. The court has
5 reviewed the facts and agrees with respondent's interpretation. Accordingly, the court includes
6 here respondent's summary of the facts relevant to Wagner's ineffective assistance of counsel
7 claim:

8 Petitioner's psychiatric expert, Dr. Albert Kastl, examined petitioner and
9 reviewed some background information and concluded that petitioner was
10 mentally deficient and could not have premeditated his attack on the victim, Paris
11 Dalton. Dr. Kastl told trial counsel that additional historical psychological records
12 would be helpful, but he did not expect it to change his diagnosis. After petitioner
13 was convicted, trial counsel found additional evidence of petitioner's troubled
14 childhood. He provided that information to Dr. Kastl and moved for a new trial,
15 but the motion was denied.

16

17 Dr. Kastl acknowledged that at the time of trial, he was already convinced
18 that petitioner "did not possess[] the cognitive ability to premeditate and plan."
19 (Exh I-4 at 19.) Dr. Kastl also conceded that at the time of his trial testimony, he
20 "believed that the information [he] possessed . . . was sufficient to support this
21 opinion" (Id.)

22 Petitioner suggests that trial counsel ignored Dr. Kastl's request for
23 additional documentation of petitioner's psychological history. However, Dr.
24 Kastl wrote only that "it would be extremely helpful in this regard to obtain copies
25 of psychological evaluations of the past." Exh A at 219. Dr. Kastl also mentioned
26 petitioner's special education and social security status only in the context of
27 inferring that earlier psychiatric evaluations must exist because those programs
28 generally required such examinations. Id. at 219, 221; but see Exh I-13 (social
security records were lost). However, Dr. Kastl never indicated that the
information was essential, nor did he tell trial counsel it was required for his
diagnosis. See Exh A at 949 (trial counsel stated that "prior to the time Dr. Kastl
testified at trial, he did not state to me that he required any further information, nor
did he ever ask me whether I had obtained any such records."); Exh I-4 at 19 (Dr.
Kastl admitted that he had already made a conclusion that petitioner was incapable
of premeditating the assault).

 Furthermore, trial counsel made a tactical decision to make identity the
primary defense.

 Accordingly, trial counsel focused on eliciting evidence and arguing that
petitioner was not the assailant. For example, counsel had the mobile park
manager testify that Dalton told him that petitioner was not the one who attacked
her. Exh B at 1193. The manager also testified that Dalton smelled of alcohol and

1 slurred her words. Id. at 1196-1197. Trial counsel further attacked Dalton's
 2 credibility by having four neighbors testify that she had a reputation for
 3 dishonesty. Id. at 1220, 1231, 1343, 1438; see id. at 1540 (trial counsel impugned
 4 Dalton's credibility by arguing she was proud of recovering from drug addiction
 5 but had Morphine, Valium, and alcohol in her system at the time of the attack); id.
 6 at 1555-1560 (trial counsel argued Dalton was not credible because she made
 7 inconsistent statements, she made deliberately false statements, she was biased,
 8 she had a bad character, and she had a motivation for fabrication). And trial
 9 counsel began his closing argument by asserting, "David Wagner did not commit
 10 this heinous crime, and I'm going to be telling you why for, probably, 90 minutes,
 11 maybe as long as two hours." Exh B at 1512. Later, counsel argued that the
 12 expert psychological evidence was a secondary defense theory. "That's where this
 13 comes in, is just in case, for some reason, that you feel that, hey, you know, he did
 14 it, which there's no evidence that he did it, there's evidence that he didn't do it and
 15 there's way more than a reasonable doubt [¶] I have to assume that I need
 16 to bring these things out, just in case, okay?" Exh B at 1546-1547.

17

18 In addition, trial counsel was precluded from eliciting testimony from Dr.
 19 Kastl that petitioner was incapable of premeditating the attack. Cal. Pen. Code §§
 20 28, 29; Exh B at 1130. Thus, trial counsel could not have elicited express
 21 evidence of that mental limitation.

22 Answer at 7-10.

23 In his amended petition, Wagner also set out the facts relating to this claim. As
 24 mentioned above, Wagner did not file a traverse. There is nothing in the record that indicates
 25 that respondent disputes the underlying course of events relayed by Wagner in the amended
 26 petition, which, as augmented by Wagner's arguments in support his ineffective assistance of
 27 counsel claim, are as follows:

28 3. Shortly after petitioner's arrest, his grandfather, Albert Wagner,
 hired private defense attorney Stephen Tulanian to represent petitioner.

4. In March 2005, trial counsel retained psychologist Dr. Albert Kastl
 to evaluate petitioner and consult with counsel about potential mental health
 defenses. After reviewing limited discovery materials, Dr. Kastl conducted a
 psychological evaluation of petitioner on March 24, 2005, for approximately five
 hours.

5. In a written report dated March 31, 2005, Dr. Kastl advised trial
 counsel that petitioner was severely compromised, but not legally insane, at the
 time of the alleged offense. Dr. Kastl believed petitioner suffered from a
 cognitive disorder, polysubstance abuse, and a personality disorder with
 prominent avoidant, schizoid, and paranoid features. He wrote that obtaining
 documentation of petitioner's life history, specifically petitioner's school
 (including Special Education), social security disability, and criminal history
 records, would be very important in fully assessing petitioner's mental health.

6. Despite this request by Dr. Kastl, trial counsel unreasonably failed

1 to investigate petitioner's medical and social history, and made no attempt to
2 obtain the records requested by Dr. Kastl.

3 7. Even before counsel received Dr. Kastl's assessment trial counsel
4 knew, or should have known, that petitioner was mentally compromised.
5 Petitioner's statement to the police shortly after he was arrested was audio and
6 video taped. In it petitioner denied any knowledge of how Dalton was injured, but
7 admitted that he had blacked out in the past and it was possible he simply didn't
8 remember attacking Dalton. Petitioner also revealed that he suffered from a
9 mental disability and was on SSI (Social Security Disability). He also told police
10 that he had been on antidepressants and had lived in a group home in Sepastopol
11 for four years.

12 8. Furthermore, on October 6, 2004, Drena Jensen, an Adult Services
13 Coordinator with the Redwood Coast Regional Center wrote to trial counsel, at
14 petitioner's request, to inform him that petitioner was currently a client of the
15 regional center. The letter was faxed to trial counsel and then mailed on October
16 8, 2004. Trial counsel failed to inform Dr. Kastl that petitioner was a client of the
17 regional center.

18 9. Dr. Kastl testified at trial about petitioner's compromised cognitive
19 abilities as they related to his ability to premeditate and plan. Dr. Kastl testified
20 that petitioner's IQ was 74, which put him in the fourth percentile of the general
21 population. Dr. Kastl also found that petitioner's memory skills were extremely
22 compromised, putting him in the first percentile in terms of his visual and verbal
23 memory capability. Dr. Kastl testified that petitioner's ability to reason and think
24 was in the first or second percentile, and his ability to plan was markedly
25 deficient. These conditions would have existed at the time of the alleged offense.

26 10. On cross-examination, Dr. Kastl testified that the only documents
27 he reviewed were discovery materials produced by the district attorney's office,
28 and two reports regarding petitioner's competency in the instant case. Dr. Kastl
testified that he did not have any independent knowledge of petitioner's history of
Special Education other than petitioner's own representation. Dr. Kastl further
testified that he had not read any psychological evaluations of petitioner, even
though he had written in his report that it would be extremely helpful to have such
evaluations. He did not receive any information regarding petitioner's medical
history or history of any psychological or cognitive disorders, nor did he receive
any Social Security Disability records. Dr. Kastl agreed with the district attorney
that a complete medical history, as well as a review of other pertinent records
would be extremely important in making a correct diagnosis. On rebuttal, Dr.
Kastl testified that he believed he had enough information to make the assertions
he testified to during the defense case-in-chief.

11 11. During his closing argument, the prosecutor argued that Dr. Kastl
12 had only given petitioner some tests and talked to him for three hours, but had not
13 talked to anyone else, and that the jury thus had not heard from petitioner's family
14 or teachers or anyone else who examined him. Furthermore, the prosecutor
15 argued that there was no evidence petitioner had ever been previously examined.
16 Therefore, he asserted, the jury should accept the determinations of Drs. Rosoff

1 and Apostle that petitioner was of average or near-average intelligence.⁵

2 12. Petitioner was convicted of attempted murder, with the allegation
3 of premeditation and deliberation found true.

4 13. Following the jury's verdicts, but before sentencing, petitioner's
5 grandfather had the Redwood Coast Regional Center fax two reports to trial
6 counsel. The first report was a 1994 social assessment of petitioner by Suzette
7 Soviero of the North Bay Regional Center, and the second report was a 1998
8 psychological evaluation of petitioner by Dr. Michael Pinkston. Both reports
9 stated that petitioner had a history of mental health issues and emotional
10 instability. Upon receiving these reports, trial counsel filed a Motion for New
11 Trial Based on Newly Discovered Evidence and Dr. Kastl was permitted to further
12 evaluate petitioner in light of these two reports and testify as to his findings. The
13 trial court denied the defense motion, finding that Dr. Kastl's testimony did not
14 support the defense proposition that the newly discovered evidence (the two
15 psychological reports) would produce a different result on retrial. Furthermore,
16 the trial court concluded that the reports were not in fact newly discovered
17 evidence and could have been discovered through the reasonable diligence of trial
18 counsel. Trial counsel was put on notice of the existence of such records in March
19 2005, when Dr. Kastl wrote in his initial report that petitioner was evaluated for
20 SSI and that any reports on petitioner should be obtained. The trial court
21 determined that even without Kastl's letter, diligence would have uncovered the
22 psychological reports.

23 14. Post-conviction counsel obtained records pertaining to petitioner
24 from the following places: Analy High School, Greenacre Home, Alta Bates
25 Hospital, Kaiser Permanente Santa Rosa, North Bay Regional Center, Redwood
26 Coast Regional Center, Sutter Medical Center (formerly Community Hospital),
27 and Sonoma County Superior Court.

28 15. Trial counsel was ineffective for failing to provide his mental health
expert with readily available and relevant records.

16 16. Dr. Kastl has reviewed petitioner's medical and social history
17 records collected by post-conviction counsel. Dr. Kastl has concluded that the
18 extent of petitioner's disabilities, and thus his inability to premeditate and plan,
19 cannot be fully understood without considering the impact of his social history.
20 Dr. Kastl also believes that his testimony at trial would have been significantly
21 strengthened had he known of petitioner's history of trauma and abuse, and
22 lifelong struggle with a developmental disability. Dr. Kastl maintains that had he
23 been privy to the information provided by post-conviction counsel he would have
24 been able to contradict the prosecution's assertion that petitioner was of normal
25 intelligence, and would have been able to present to the jury a far more
26 compelling explanation as to why petitioner lacked the ability to premeditate and
27 plan the alleged attack. He also believes that had he been in possession of the
28

⁵ Drs. Apostle and Rosoff were appointed to examine Wagner in order to determine his competency pursuant to the California Evidence Code § 730, and they submitted reports to the trial court dated March 9, 2006 and March 10, 2006, respectively. CT 889-896. Both doctors found Wagner competent to stand trial. CT 892, 896. On March 30, 2006, the trial court "considered Dr. Apostle and Dr. Rosoff's reports," and was "satisfied based on [their] reports that the defendant [was] mentally competent" at that time; therefore, "the criminal proceedings [were] not suspended." CT 888.

1 social history materials at the time of trial, he could have presented to the jury a
2 more compelling explanation of the significance of the psychological test results
he administered.

3 17. A constitutionally adequate investigation of petitioner's social and
4 medical history would have revealed that petitioner is a mentally retarded
5 individual with severely compromised cognitive function. He suffers from an
6 extreme lack of impulse control, which has dominated all aspects of his life from
very early childhood throughout his adulthood. He is a victim of severe neglect
and abuse, which has further compromised his ability to not only control his
physical behavior, but to conduct himself appropriately within the confines of
social situations.

7⁶

8 18. The prosecution's theory of the case required that petitioner possess
9 the ability to reflect on his situation with Dalton, and then make the cognizant
10 decision to pick up a knife, walk 364 feet to the pay phone, and attack her.

11 19. The post-conviction investigation has revealed, however, that
12 petitioner's developmental disability and history of trauma and abuse makes this
theory subject to significant doubt. Petitioner suffered from apparent in-utero
13 drug exposure, fetal distress, and trauma throughout his childhood and
adolescence. Petitioner was cognitively and mentally compromised from the very
14 beginning of his life, as clearly demonstrated by the severe difficulties he had not
only in school, but also in socialization. He was identified as developmentally
15 disabled from a young age and his cognitive disabilities are well documented.
Living with such disabilities would be hard enough, but compounding petitioner's
16 situation was the fact that at a crucial time in his emotional development, he fell
victim to horrific sexual abuse. These traumatic experiences early in life had a
17 dramatic and detrimental effect on his development. Instead of being raised in a
safe, nurturing, or loving environment, petitioner was forced to spend the
18 formative years of his adolescence at a group home. His anger management issues
and impulse control disorder are indicative of the long term effects of his
upbringing. Petitioner is prone to both depression and substance abuse, and has
19 never learned how to function within societal structures.

20 20. While Dr. Kastl testified that he believed that the information he
possessed at the time of making this determination at trial was sufficient to
21 support his testimony, he believes that his testimony would have been
significantly strengthened had he known of petitioner's history of trauma and
22 abuse, and his lifelong struggle with developmental disability. This is precisely
why Dr. Kastl requested additional records and documentation from trial counsel.

23 21. Due to trial counsel's failure to provide Dr. Kastl with the
24 appropriate documentation of petitioner's life, the jury did not have the
opportunity to hear of petitioner's lifelong struggle with his developmental
25 disability, nor were they privy to the fact that many professionals over the years
have found him to be extremely compromised. Such documentation would have
26 substantially reinforced Dr. Kastl's assessment that petitioner was too cognitively
deficient to have premeditated and deliberated an attack on Dalton. Furthermore,

27
28 ⁶ The court has deleted the sections captioned "Developmental Disability" and "Trauma
and Abuse." Am. Pet. Attach. at 7-16.

1 the jurors heard nothing of petitioner's traumatic childhood and upbringing,
2 specifically the abuse he suffered at the hands of his uncle. As a result, the jury
3 could not evaluate petitioner's culpability in light of his well documented
4 limitations.

5 22. The prosecutor challenged Dr. Kastl's opinion based on the fact that
6 the two doctors appointed to evaluate his competency found him to be of normal
7 intelligence. However, neither doctor completed formal testing of petitioner. Had
8 Dr. Kastl been aware of petitioner's significant history with Special Education and
9 the Regional Center system, he could have challenged their findings. Further,
10 without documentation regarding petitioner's medical or social history, Dr. Kastl's
11 testimony was vulnerable to a strong challenge by the prosecutor as to what
12 elements he used in his assessment of petitioner.

13 Am. Pet., Attach. at 2-7, 16-18 (footnotes added).

14 Respondent included in his answer a factual background pertaining to the second motion
15 for a new trial:

16 In petitioner's second motion for a new trial, the state trial court reviewed
17 the same "new" evidence petitioner now contends would have changed the result
18 at trial. Exh B (July 6, 2006) at 4-44:

19 At trial, Dr. Kastl testified that the defendant did not appear grossly
20 delusional, that he was oriented as to place and person. At trial, he testified
21 that he had enough information available to him from his interview of the
22 defendant on March 24th [2005] and the thoroughness of all these tests that
23 were administered to render a competent opinion about the defendant's
24 ability regarding reasoning and planning; . . . [and] that it would be helpful
25 to have additional information but that not being available, he had enough
26 information to reach his conclusions at trial.

27 So at trial, he's basically saying he had enough to render competent
28 opinions. Now he's testifying on the second motion for new trial that he
didn't have enough. That undercuts his opinion on -- as expressed in this
second motion for new trial.

His opinion is also, in the Court's view, undercut by the videotaped
interview of the defendant by Detective Bell, Exhibit 35. That videotape
shows that defendant was oriented as to time, person, and place; that he
was responsive to questions asked; that he was not cowed or led into
incriminatory responses; showed that he had an ability to form a motive
and plan goal directed activity. Exh B (July 6, 2006) at 33-34.

The trial court also noted that the videotape demonstrated that petitioner
knew the difference between right and wrong, truth and lies. Exh B (July 6, 2006)
at 34-36. It found that Dalton was credible and even petitioner corroborated her
in many ways. Id. at 37. It also found the finding of premeditation was supported
by extensive evidence of motive, prior planning, and an intentional method of
assault. Id. at 38-43. After listing the evidence over five pages of transcripts, the
trial court concluded, "they all add up to the conclusion that the mental states here
were shown." Id. at 43. The court found there was "also additional circumstantial
evidence of the mental states in issue . . . [including] the concealment of the knife
after the stabbing" Id. "So based upon all of that foregoing reasoning, I

1 cannot conclude that the newly discovered evidence would probably produce a
2 different result on retrial." Id.

3 Answer at 12-13.

4 B. Applicable Federal Law

5 The Sixth Amendment right to counsel guarantees not only assistance, but effective
6 assistance, of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). The benchmark
7 for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the
8 proper functioning of the adversarial process that the trial cannot be relied upon as having
9 produced a just result. Id. In order to prevail on a Sixth Amendment ineffectiveness of counsel
10 claim, a petitioner must establish two things. First, he must establish that counsel's performance
11 was deficient, i.e., that it fell below an "objective standard of reasonableness" under prevailing
12 professional norms. Strickland, 466 U.S. at 687-88. Second, he must establish that he was
13 prejudiced by counsel's deficient performance, i.e., that "there is a reasonable probability that,
14 but for counsel's unprofessional errors, the result of the proceeding would have been different."
15 Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the
16 outcome. Id. If a petitioner cannot show prejudice, then the court need not consider whether
17 counsel's performance was deficient. See Williams v. Calderon, 52 F.3d 1465, 1470, n.3 (9th
18 Cir. 1995).

19 A lawyer need not file a motion that he knows to be meritless on the facts and the law.
20 See Wilson v. Henry, 185 F.3d 986, 990 (9th Cir. 1999) ("to show prejudice under Strickland
21 from failure to file a motion, [a petitioner] must show that (1) had his counsel filed the motion,
22 it is reasonable that the trial court would have granted it as meritorious, and (2) had the motion
23 been granted, it is reasonable that there would have been an outcome more favorable to him");
24 Lowry v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994) (failure to file suppression motion not
25 ineffective assistance where counsel investigated filing motion and no reasonable possibility
26 evidence would have been suppressed); see also Rupe v. Wood, 93 F.3d 1434, 1445 (9th Cir.
27 1996) (failure to take futile action can never be deficient performance).
28

1 C. Analysis

2 Wagner claims that trial counsel's failure to adequately prepare Dr. Kastl constitutes
3 ineffective assistance, stating:

4 23. No tactical reason exists for trial counsel's unreasonable failure to
5 investigate, discover, introduce at trial, and inform petitioner's expert witness of
6 evidence of petitioner's history of developmental disability, medical and
7 psychological trauma, and history of abuse. Dr. Kastl specifically identified and
8 asked for particular records, and trial counsel's failure to investigate in this regard
9 constitutes constitutionally inadequate assistance of counsel.

10 24. Petitioner was prejudiced by this inadequate assistance of counsel in that
11 it effectively deprived him of a viable defense to the claim that he premeditated
12 and deliberated the attempted murder of Dalton. Absent trial counsel's errors and
13 omissions, it is reasonably probable that the jury would have returned a verdict
14 more favorable to petitioner.

15 Am. Pet., Attach. at 19.

16 To establish his entitlement to relief on the ineffective assistance of counsel claim,
17 Wagner must show that, had his trial counsel provided Dr. Kastl with his historical psychological
18 reports, then these additional reports would have enabled Dr. Kastl to more convincingly testify
19 that Wagner did not premeditate the attempted murder, and a reasonable probability that the
20 result of the proceedings would have been different.

21 Respondent argues that Wagner can show neither deficient performance of counsel nor
22 prejudice based on trial counsel's failure to prepare Dr. Kastl. This Court finds respondent's
23 argument concerning deficient performance wanting, but agrees that Wagner cannot show
24 prejudice.

25 Respondent argues:

26 Trial counsel made a reasonable tactical decision to emphasize an identity
27 defense rather than admitting petitioner committed the assaults without criminal
28 intent. Moreover, Dr. Kastl had sufficient background information and current
exam results to conclude that petitioner did not premeditate the stabbing.
Therefore, trial counsel's efforts were more than adequate to support the desired
testimony.

Furthermore, Dr. Kastl was legally precluded from testifying that petitioner
did not premeditate the attempted murder. So the evidence of mental deficiency
Dr. Kastl already had went beyond the scope of permissible testimony. Therefore,
trial counsel had no compelling reason to seek out additional evidence --
especially since that evidence might undermine Dr. Kastl's evaluation.

Similarly, there was no need for further investigation because the mental

1 deficiency defense conflicted with the identity defense since it implicitly
2 acknowledged that petitioner was the assailant. Therefore, trial counsel had no
3 reason to devote substantial resources to that investigation because he could not
4 emphasize that evidence without undermining the primary defense theory.
5 Finally, once the jury determined that petitioner committed the crimes charged,
6 it necessarily accepted a cluster of evidence that overwhelmingly demonstrated
7 that petitioner did, in fact, premeditate the attempted murder. Therefore,
8 petitioner can show neither deficient performance of counsel nor prejudice.

9 Answer at 4-6. This court disagrees that counsel's failure to obtain and provide to Dr. Kastl the
10 readily available reports and records concerning Wagner's development was reasonable. Having
11 determined to hire "an expert, Dr. Kastl, who interviewed the defendant, conducted tests, and
12 later testified for the defense at trial," Cal. Sup. Ct. Opinion at 2, counsel should reasonably
13 have provided the expert with all readily available mental health records. While Dr. Kastl
14 nevertheless reached a diagnosis that was favorable to the defense and concluded that petitioner
15 could not have premeditated an attack on the victim, it would have been buttressed by further
16 information, as the expert himself testified.

17 However, the Court agrees with respondent and the Superior Court that Wagner cannot
18 show prejudice. As a preliminary matter, counsel's primary defense was mistaken identity;
19 cognitive impairment was treated as a backup. Further, as the trial court noted, the evidence of
20 Wagner's premeditation was extensive. Resp't Ex. B (July 6, 2006) at 38-43. Specifically,
21 during the hearing on the second motion, the trial court indicated that "[i]n so far as the law on
22 premeditation and deliberation, the cases tell us you look at motive plus prior planning plus
23 manner of attempted killing." Id. at 38. That court added: "You look at those three factors in
24 determining whether there's been a demonstration of premeditation and deliberation. And I think
25 you can also look at those things in terms of the other mental states at issue here." Id.

26 First, the trial court determined that Wagner had motive:

27 So this all tells us about the motive, that the defendant had wanted Paris
28 Dalton to move out of unit No. 13 because his grandfather owned it and that his
grandfather did not allow him to have renters; that his grandfather was coming up
the next day; that it was imperative that the defendant move the victim out or his
grandfather would take unit No. 13 away from him.

In addition, the defendant and Paris Dalton had been involved in this knock
down drag out fight because she wouldn't move out, and that just served to make
him even more angry. And, in addition, he felt that she was calling the police. So
this is all the motive that led up to what happened.

1 Id. at 40-41.

2 The trial court also analyzed Wagner's prior planning activity, stating:

3 . . . clearly the defendant, according to this evidence, picked up the knife in unit
4 13. He realized that it could be used to kill. He was aware that stabbing someone
5 in the back and cutting someone's throat could kill them. He walked for this
6 substantial distance with the knife in his hand. He didn't assault just someone at
7 random but rather he chose to assault someone who was threatening his lifestyle,
who would not follow his directions, and who had fought with him. So this isn't
like the example of the assailant thinking he's breaking a jar when in reality it's a
homicidal act.

8 Id. at 41.

9 Finally, the trial court looked at the manner of attempted killing, as follows:

10 . . . Paris Dalton says she looked and saw the defendant coming to the phone
11 booth; that the defendant got up to the phone booth and asked who she called and
12 she said, "I tried to call my girlfriend, but she was not at home"; that the defendant
13 then said, "Come home and it will be okay"; that then she felt the knife go in her
14 back. He was behind her when she felt the impact to her back. She then grabbed
15 her back, sat down. She says the defendant then cut her throat. She told the
16 defendant she thought she'd bleed to death if she didn't go to the hospital. And
17 the defendant said, "Let me call the ambulance," "If I told them that the defendant
did not do this." So he said he'd call the ambulance if she would say he didn't do
it, that she was to say that he had just rescued her, and she said okay.

18 We have another independent witness, fellow by the name of -- a person
19 by the name of Arbon Barbow, who says that Ms. Dalton stated her roommate
20 stabbed her in the back and cut her throat.

21 We have the testimony of Dr. Schug probing the stab wound as being 2
22 plus inches in depth; that the victim had a collapsed lung; that the wound entered
the chest cavity and the lung and liver surround that particular injury; that the back
injury, if untreated, is potentially a life threatening injury because of the injuries
to the lung; that the victim also had a 3 1/4 inch cut on her neck. The structures
in that area are the trachea windpipe, jugular vein, and carotid artery, and that that
neck wound was within one half inch of both the windpipe and the jugular vein.
If that vein had been cut and untreated, death would occur within minutes. If the
trachea were cut, blood would flow into the lungs and stop the lungs from
transporting oxygen. So that's a life threatening injury.

23 So we're not talking about a stab to the hand or to the ankle or to the knee.
24 We're talking about areas that everyone, and I conclude also the defendant,
understood were vital areas. So that's the manner of the attempted killing.

25 Id. at 42-43. After evaluating the aforementioned three factors, the trial court denied the second
26 motion for a new trial as follows:

27 When you look at these three factors, motive, prior planning activity,
28 manner of the attempted killing, they all add up to the conclusion that the mental
states here were shown.

1
2 There's also additional circumstantial evidence of the mental states in issue
3 in that the concealment of the knife after the stabbing and slashing. Clearly
4 certain materials in unit No. 13 were used to conceal the knife involved in this
5 case. And that was found about -- well, over 700 feet from unit 13. So that's also
6 showing the state of mind here.

7
8 I might also point out that a finding of premeditation and deliberation as I
9 understand the law is not dependent upon the defendant having in mind all of the
10 possible consequences at the time of the assault. And I also don't feel that the
11 conduct of the victim here was sufficiently provocative that would cause an
12 ordinary person of average disposition to act rashly or without due deliberation
13 and reflection.

14
15 So based upon all of that foregoing reasoning, I cannot conclude that the
16 newly discovered evidence would probably produce a different result on retrial.
17 Therefore, this second motion for new trial is denied.

18
19 Id. at 43-44. In rejecting Wagner's ineffective assistance of counsel claim on state habeas
20 review, the state superior court acknowledged that his trial counsel "unsuccessfully moved for
21 a new trial," as explained above. Cal. Sup. Ct. Opinion at 2. The state superior court denied
22 habeas relief because it found that trial counsel's actions were "what would be expected of a
23 competent defense counsel." Id.

24
25 Assuming arguendo that trial counsel provided incompetent assistance, there was no
26 prejudice because it is not reasonably probable that Dr. Kastl -- had he received the additional
27 historical psychological reports -- could have done more to persuade the jury that Wagner did
28 not premeditate the crimes. As discussed above, Dr. Kastl was precluded by law (and the trial
court) from testifying that Wagner did not premeditate the crimes. Cal. Pen. Code §§ 28, 29; RT
1130. Therefore, Dr. Kastl's ability to testify about Wagner's ability to premeditate or form the
intent to kill was limited. Accordingly, trial counsel used Dr. Kastl's testimony in his closing
argument sparingly because he was raising a technical legal defense that contradicted his main
factual defense, stating the following:

And what [Dr. Kastl] says, essentially, is this man is at the low -- lowest
level you can be in, in being able to plan these things out, such as an intent to kill
or an intent to permanently disfigure, in Court Two, the mayhem charge.

They go to whether [Wagner] premeditated or deliberated over this. That's
an important thing. If he did it, which he didn't, then you'd have to determine this:
Did he have the intent to kill in Court One? No. Did he have the well, did he
form, in his mind, deliberate, or premeditate? No, he didn't.

1 We know he didn't because of the circumstances here. There wasn't
2 enough time to, except counsel wants to say he walked for a football field's
3 distance with this knife, which there's no evidence of. But he doesn't have the
4 cognitive ability to form these kinds of intents, ultimately. He's not just that kind
5 of person. That's why Dr. Kastl was called. Be that as it may, we don't even have
6 to go there with Dr. Kastl.

7 RT 1547-1548.

8 This court cannot find that the technical legal defense -- Wagner's mental limitation
9 defense -- had a reasonable probability of success. Once the jury rejected Wagner's main
10 identity defense or actual innocence defense, the evidence of premeditation was extensive.
11 Since Wagner cannot show a reasonable probability of a more favorable result, thus, there was
12 no prejudice. See Strickland, 466 U.S. at 694.

13 In sum, Wagner has not established ineffective assistance of counsel under the Sixth
14 Amendment, nor has he shown that the state superior court's rejection of his claim was
15 objectively unreasonable. See Terry, 529 U.S. at 409; see also Bell v. Cone, 535 U.S. 685, 698-
16 99 (2002); Yarborough v. Gentry, 540 U.S. 1, 6 (2003).

17 Accordingly, Wagner is not entitled to habeas relief on this claim.


18 CONCLUSION

19 For the foregoing reasons, the petition for writ of habeas corpus is DENIED. A certificate
20 of appealability will not issue. Reasonable jurists would not "find the district court's assessment
21 of the constitutional claim[] debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).
22 Wagner may seek a certificate of appealability from the Ninth Circuit Court of Appeals. The
23 clerk shall enter judgment in favor of respondent, and close the file.

24 The court also directs the clerk to substitute Warden Randy Grounds as the respondent
25 in this action. See supra note 3.

26 IT IS SO ORDERED.

27 DATED: November 22, 2011

28 
SUSAN ILLSTON
United States District Judge